



DEPARTMENT OF THE AIR FORCE
AIR EDUCATION AND TRAINING COMMAND

NOTE: This document provides information about the law designed to help you safely cope with your own legal needs. But legal information is not the same as legal advice -- the application of law to an individual's specific circumstances. Although we go to great lengths to make sure our information is accurate and useful, we recommend you consult a lawyer if you want professional assurance that our information, and your interpretation of it, is appropriate to your particular situation

INFORMATION PAPER

TEXAS DIVORCE LAW AND MILITARY PERSONNEL

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Summary/Disclaimer

1. GENERAL:

If your marriage is having problems, you should look at divorce as the last--not the first option. Seek counseling, which is available from the installation chaplain, your church, or the Family Advocacy Program. (On most installations, at least one spouse must be active duty to receive counseling, and there's usually a waiting list. For retired members, civilian employees, or those who need more immediate help, they can provide both military and civilian referrals.) If counseling fails, our Legal Office can provide information to help make the divorce less painful and messy but military attorneys cannot represent either spouse--military or not--in the actual legal proceedings.

2. RESIDENCY REQUIREMENTS:

Before you or your spouse can file for divorce in Texas, one of you must have lived in Texas for at least the last six months and in the county where the divorce will be filed for the last 90 days. One spouse can file for divorce in Texas even if the other spouse is not a Texas resident. If you are a Texas resident who is in the military, the time you have spent outside the state is still counted toward residency in Texas, and your home county remains the same for divorce filing purposes. These residency requirements can not be waived, so if you or your spouse hasn't lived here long enough, you'll have to wait to file for divorce until the requirements are met.

3. GROUNDS FOR DIVORCE:

The most common ground for divorce in Texas is the no fault basis. This states that the marriage has become insupportable (unendurable) because of discord or conflict between the spouses that destroys the legitimate ends of the marriage relationship and prevents any reasonable expectation of reconciliation. Alternatively, there are other "fault" grounds that may be used. These include cruelty, adultery, conviction of a felony, abandonment for at least a year, living apart without cohabitation for at least three years, or confinement in a mental hospital for at least three years.

4. LEGAL ADVICE

a. Installation Legal Offices:

Military Legal Assistance Attorneys can give you the kind of advice you'll find in this pamphlet--information that will help you be better prepared for the divorce proceedings. They can tell you areas of special concern to military personnel and provide an overview of your rights. They cannot file your divorce papers or represent you in court. In most cases they cannot prepare your divorce paperwork. However, attorneys at Fort Sam Houston's legal assistance office can prepare the paperwork for a pro se divorce only in cases in which there are no children or expected children, no real estate, minimal assets or debts, the parties are in agreement regarding the division of property, and the non-client spouse will sign a waiver of citation. Additionally, the residency requirements for filing must also be met. However, once the paperwork is drafted, you must file it yourself and represent yourself in court.

b. Do-it-Yourself Divorce:

No matter how uncomplicated and amicable your divorce may seem, it's too important to be handled through standard forms and kits. Trying to save a few dollars now could end up costing you much, much more down the road because of legal ramifications you didn't foresee and the kit didn't cover.

c. Private Attorneys:

There's no such thing as a "friendly" divorce because conflicts of interest are inherent in divorce proceedings. You shouldn't depend on your spouse's attorney to represent you; in fact, a Texas attorney can't ethically represent both spouses. A lawyer can work with the unrepresented spouse to negotiate a settlement, but he can't give legal advice to that spouse and must advise the unrepresented spouse of the right to seek other counsel.

(1) Fees: How much a private attorney charges will depend on the complexity of the divorce. Generally, fees are higher when there are children and property involved and when the divorce is contested. Lawyers often charge flat fees, or a "package price" for uncontested divorces; when the divorce is contested, they usually charge an hourly rate. Your lawyer may require all or part of the fee to be paid in advance. Make sure you understand your obligations to pay attorney's fees and that you have this information in writing. Your initial meeting with the attorney is the time to discuss costs. After the divorce is filed, the court, on a motion from either party or on its own, can order one spouse to pay the other's reasonable attorney's fees and expenses. The court also may award legal costs as part of the property settlement.

(2) Selection:

(a) Local: Besides looking under "attorneys" in the Yellow Pages, you can find a lawyer through personal referrals or by calling the San Antonio Bar Association Lawyer Referral Service at (210) 227-1853. We also maintain a referral list that is available at the front desk of the Legal Assistance Office. Some lawyers use the designation "Board Certified in Family Law". This means that they have completed specialization requirements of the Texas State Bar. These requirements include passing comprehensive exams and devoting a certain percentage of their current practice to family law. You may not need a board-certified specialist for every divorce, but consider one if your divorce will be contested or involve large amounts of property.

(b) Out of the local area: The *Martindale-Hubbell Directory* gives a brief biography of lawyers practicing throughout the country. It lists a large number of attorneys and law firms from every U.S. state and territory. You are welcome to look through the Legal Office's copy. Additionally, you may access the directory for free at <http://www.martindale.com>.

The *Lawyer Referral Service* is a statewide service similar to those offered for doctors and dentists. Lawyers who subscribe to the service are listed by area of practice and specialization (divorce, personal injury, etc.) and by geographic location. The service will make the first appointment for you at a cost of about \$20 for the first half hour. The telephone number is 1-800-252- 9690.

d. Legal Aid:

Although funding cutbacks have reduced availability, low income or indigent persons may qualify

for assistance through Texas Rio Grande Legal Aid. The San Antonio number is (210) 212-3700. Additionally, assistance may be available through the St. Mary's University School of Law-Civil Justice Clinic. They may be reached at (210) 431-2596.

5. PROCESS BETWEEN FILING AND FINAL DECREE

a. Filing:

The first step in starting the divorce proceedings is filing a divorce petition. If you're the spouse seeking divorce, your petition must be filed with the District Clerk's office in your county of residency. Your spouse may receive the petition in many ways. The following are the most common:

- (1) By certified mail, return receipt requested from the court clerk, or,
- (2) By personal service from a deputy sheriff in the county of filing or anyone else authorized by law.

If your spouse files for divorce and you are served with the divorce petition, your attorney should file a responsive pleading or answer. You have at least 20 days to file an answer; however, until the divorce is final, you can usually still file an answer and make an appearance in court. But, in some cases, failing to file an answer may result in a default judgment against you, which means you're no longer entitled to your "day in court."

If you receive the divorce petition by mail, a "waiver of citation" will be included. If you sign this document and file it with the court, you're essentially telling the court that you've been advised of the divorce action and don't want to contest it. Don't sign this waiver unless you and your spouse have agreed to all the terms of the divorce, put these terms in a signed writing, and reviewed the written agreement. Be sure you understand exactly what the agreement means and that it is included in the petition. Once you've signed the waiver, you normally won't receive any further notice of what goes on in the divorce proceedings. You should have your own attorney review the documents before you sign the waiver.

b. Alternative Dispute Resolution (ADR):

A Texas court may refer a dispute for resolution by an alternative dispute resolution procedure such as mediation, mini-trial, moderated settlement conference, summary jury trial, and arbitration. Both parties must include as part of their first pleading a "Statement on Alternative Dispute Resolution." Parties can be compelled to participate in ADR procedures (but cannot be compelled to settle their case during it). The vast majority of disputed cases in Bexar County are referred for ADR, usually mediation. Texas law also provides procedures for making arbitration or agreements reached in mediation binding if the parties agree. The local rules for Bexar County courts require ADR for jury trials.

Couples seeking a divorce, who have not yet filed a petition and cannot reach an agreement, may also seek mediation to reach an agreement before filing. This is generally less expensive than a contested divorce and may give the parties more control over the selection of a mediator.

c. Delay of trial for military members:

A spouse on active duty may be unable to attend the divorce proceedings because he or she isn't stationed near the divorce court. In this case, the military member can petition the divorce court to delay the proceedings until military requirements allow the member to attend. The judge will grant the delay unless-he feels the military service doesn't materially affect the member's ability to attend. If your spouse is on active duty and doesn't want to exercise this privilege (which is granted by the *Servicemembers' Civil Relief Act*, 50 U.S.C.A. App. § 521 (2003)), your attorney should have your spouse waive the privilege in writing.

d. Waiting period:

Under Texas law, a divorce will only be granted after sixty (60) days have passed since the filing of the divorce petition.

e. Spousal restraining orders:

The onset of divorce proceedings can be a traumatic time when emotions sometimes get the better of rational thinking. Even though you are still legally married to your spouse at this time, that doesn't mean that you or your children must continue to endure harassment from your spouse. Once the divorce petition is filed, the court may grant a temporary restraining order as needed to protect you and your children. These orders can prohibit your spouse from harassing (including through the mail or by telephone), threatening or injuring either you or your children.

If your spouse has actually committed family violence, you can obtain a protective order barring him or her from your residence or from going near your child's school or child-care facility. Copies of protective orders are sent to your local law enforcement agencies (and the school or child-care facility, if any), but not to the military police. Thus, if you live on a military installation and obtain a protective order, you will need to personally provide the military police with a copy.

If you are a victim of family violence the following agencies may be able to assist you:

For Protective Orders:

Bexar County District Attorney:	(210) 208-6800
Guadalupe County Attorney:	(830) 379-6095
Comal County District Attorney:	(830) 620-5533

Women's Shelters:

Battered Women's Shelter:	(210) 733-8810
Comal County Women's Shelter:	(830) 620-HELP

Law Enforcement:

Emergency:	911
San Antonio Police Dept. - Victims Advocacy Unit:	(210) 207-2141
Bexar Co. Sheriff's Dept. - Crisis Intervention Bureau:	(210) 270-6003

Other:

Family Violence Legal Line	1-800-374-HOPE
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Family Law Hot Line	1-800-777-FAIR
Child Protective Services	1-800-252-5400
Counseling:	
Rape Crisis Center-Crisis Line	(210) 349-RAPE
Child Abuse Counseling - SAPD	(210) 207-2180
Alamo Children's Advocacy Center	(210) 675-9000 (sexual abuse only)
Family Conflict Counseling Center	(210) 930-3669
Family Service Association	(210) 299-2400

f. Restraining orders regarding property:

The court can also issue orders to prohibit your spouse from acting--selling, transferring, destroying, removing, concealing, spending, withdrawing and so on--with regard to your separate or marital property. The court also can order an inventory, appraisal and/or production of property.

DOs

If you or your spouse own property, DO get originals (or at the very least copies) of all legal papers, insurance policies, titles and deeds, certificates of deposits, bank books, canceled checks and monthly statements, notes, deeds of trust or mortgages, pension and profit sharing plans, payroll check stubs or leave and earning statements, contracts, income tax returns (for the past five years), financial statements, lists of credit card numbers and savings bonds, and any other information that might have any bearing at all on any property.

DO discuss with your attorney any assets that your spouse might dispose of without your consent including checking accounts, stocks, bonds, certificates of deposits or personal property such as boats, guns, and so on. Any asset encumbered by a lien (car or property) needs to be protected, so discuss that, as well as steps for ensuring that any business or commercial activities remain solvent.

DON'Ts

DON'T dispose of any assets or money (other than for reasonable living expenses) or tell your spouse that you intend to do so.

DON'T buy anything other than necessities during the divorce process. If you buy a car, a stereo, or household goods, in Texas it becomes community property in which your spouse has an interest. If you sign a contract and pay earnest money or a deposit, you're acquiring a community asset.

DON'T make payments on bills, notes or loans other than what's normally due, and don't borrow any money without consulting your attorney.

g. Temporary support of spouse:

The court may order temporary support payments for either spouse, including the payment of reasonable attorney's fees. The military still expects an active duty member to support their family members (dependents) even if the spouses are separated.

DOs

DO, if you're the primary wage earner, make plans to support your spouse and any children during the divorce proceedings. Realize that you're now probably maintaining two households, rather than one, and you'll probably have to lower your standard of living. The various uniformed services have different definitions for adequate support. The applicable Air Force regulation is AFI 36-2906. It does not provide a specific dollar amount, but indicates that the amount must bear a reasonable relationship to the needs of the dependents and the ability of the member to provide support. Air Force regulations state that termination of BAH with dependent rate does not relieve the member of the obligation of support. The applicable Navy regulation is MILPERSMAN Article 1754-030. It provides for different levels of support based on the number of dependents that you have. For example, one-third (1/3) of gross pay will be due if you only have your spouse as a dependent; one-half (1/2) of gross pay will be due if you have a spouse and one child; three-fifths (3/5) of gross pay will be due if you have a spouse and two children; one-sixth (1/6) of gross pay will be due if you only have one child; and one-fourth (1/4) of gross pay will be due if you have two children only. Army Regulation 608-99 indicates that in the absence of a written agreement or court order, the soldier will provide financial support in an amount equal to the applicable BAQ- WITH DEPENDENT rate.

6. PROPERTY DIVISION AND SETTLEMENT:

This may be one of the most important reasons you need an attorney. When you and your spouse have few possessions, the property settlement may not be very important, but for military couples, it can have far-reaching consequences--including affecting retirement pay.

a. General concept:

Texas is a community property state, which means that each spouse has an interest in the property. All property owned by either or both spouses is classified as either:

(1) *Separate:* All property you or your spouse acquired before marriage and any property you acquired separately after marriage either as a gift or by inheriting it. There are exclusions to this principle, which your attorney can explain to you. Generally, upon divorce you are entitled to keep all of your separate property.

(2) *Community:* All property acquired by either spouse during marriage that doesn't

satisfy the definition for separate property.

Upon divorce, the court will divide community property in a “just and right” manner, taking into account the rights of each party and any children. Nothing obligates the court to divide the property equally, especially if it isn't feasible or practical to split property in half.

All property is presumed to be community property upon divorce. You or your spouse can prove something is separate property by providing clear and convincing evidence that you either acquired it before marriage or after marriage as a gift or bequest. Additionally, property that might seem on its face to be separate property will be considered community property in Texas, for example:

(a) If community income paid for your life insurance policy, the cash surrender value of that policy is community property.

(b) Income (rent, interest, dividends, royalties, etc.) derived from separate property is community property.

(c) Community property funds spent on separate property may entitle the non-owning spouse to reimbursement.

b. Military retirement pay:

One of the most significant areas of concern to divorcing couples is military retirement pay. Under the Uniformed Services Former Spouse Protection Act (USFSPA), states may treat retirement pay as marital property. The act doesn't create an automatic entitlement to a portion of the retirement pay; it merely gives states the option to divide the pay as part of the divorce settlement. In Texas, retirement pay is considered community property--which means that both spouses are considered to "own" the retirement pay and it may be divided among both of them.

Consequently, it's extremely important that retirement pay be addressed as part of the property settlement. If the divorce judgment doesn't divide the retirement pay, both you and your former spouse will own the retirement pay as tenants in common. The non-military spouse may then bring a suit to partition (divide) the property and receive a proportional share at any time after the divorce.

The consequences of such a division can result in a real, unforeseen hardship to the military spouse. For example, you, as the military member, get a divorce but the decree doesn't mention your retirement benefits. You remarry, have two children and then retire eight years later, relying heavily on your retirement pay for family support. Your former spouse then brings a partition suit for a proportional share of your future retirement pay plus a back share of the retirement benefits you've already received. (Your ex-spouse has to bring the suit within two years after either the divorce is final, if you are already retired, or when your right to the property matures, which in this case is when you retire.) If your ex-spouse brings the suit in time, you will have to share your retirement income.

(1) *Types of pay covered:* A key exception to categorizing post-employment pay as community property is disability pay. In Texas, military disability benefits paid for service-connected disabilities and readjustment benefits are considered the sole property of the military member. Military disability benefits paid for non-service related disabilities, however, are treated as community property, as are the following types of benefits:

- (a) Private profit-sharing and disability plans
- (b) Civil Service retirement benefits
- (c) Federal workers compensation benefits
- (d) Employee Retirement Income Security Act benefits

The following benefits are not considered subject to Texas laws for property settlements:

- (a) Social Security benefits
- (b) Veterans Administration benefits
- (c) Railroad Retirement Act benefits

(2) *How to compute the division:* Texas courts will divide only the community interest in the retirement pay. The following formula is used to compute the community interest:

months of military service during the marriage / total months of military service at retirement = percentage of retirement subject to division (community interest)

The community interest is subject to just and right division by the court-- which does not require equal division. However, for purposes of illustration, the following examples assume the community interest is being divided equally, so the community interest is multiplied by one-half.

(a) Lt Col A joined the service in 1967 and married Mrs. A in 1973. The couple was married for six years (72 months). Lt Col A retires in 1987 after 20 years (240 months) of service. Thus, the six years of marriage are divided by the 20 years of military service because all of the marriage was concurrent with the military service.

$$1/2 \times 72/240 = 72/480 = 15\%$$

Thus, the former Mrs. A is entitled to 15 percent of the present value of Lt Col A's retirement if the court divides the community interest equally.

(b) Major B and Mr. B were married two years before Major B entered the service. They become divorced after she's served 19 years (228 months). Even though they were married 21 years, only 19 years of the marriage occurred while in the service. Thus, after Major B retires, Mr. B is entitled to 47.5 percent of the retirement pay, as follows:

$$1/2 \times 228/240 = 228/480 = 47.5\%$$

(c) MSgt C joined the military in 1969; SSgt C joined in 1972. They were

married in 1975 and divorced in 1979 (after four years or 48 months). MSgt C retires after 26 years (312 months) of service; SSgt C after 20. MSgt C is entitled to 10 percent of SSgt C's retirement benefits as follows:

$$1/2 \times 48/240 = 48/480 = 10\%$$

Conversely, SSgt C is entitled to 7.6 percent of the present value of MSgt C's retirement:

$$1/2 \times 48/312 = 48/624 = 7.6\%$$

(3) *Future retirement benefits:* Retirement benefits are community property even after the divorce. Post-divorce increases in payments to the military spouse are owned by both parties and will generally be divided proportionately.

(4) *Remarriage or death:* Remarriage is irrelevant because the retirement pay is considered deferred community income. The non-military spouse will continue to receive his or her proportionate share regardless of marital status. However, the death of either spouse will terminate the payments. (See the information on the Survivor Benefit Plan (SBP) on page 17).

(5) *Direct payment:* The court may divide retirement pay regardless of the length of the marriage; the only role the length plays is in the actual calculations of the proportionate share. However, the duration of the marriage becomes important in determining whether direct payments may be made. The USFSPA authorizes court-ordered direct payment only when the former spouse was married to the military member for at least 10 years, and, during the marriage, the military spouse performed at least 10 years of creditable service. Thus, in the earlier examples, only Mr. B is eligible for direct payment.

Direct payment allows the military member's retired pay to be paid directly to a former spouse in the amount needed to comply with the court order, provided the direct payment doesn't exceed 50 percent of the disposable retired pay or 65 percent if the member's pay is also subject to withholding or garnishment for other legal obligations such as child support. The military member doesn't have to consent to this direct payment, but direct payment under the USFSPA cannot begin while the member is still on active duty. While the court may divide the retirement pay in advance, direct payment doesn't begin until the member actually retires.

To set up direct payment, you should:

(a) Complete the DD Form 2293, available from DFAS (except for the Coast Guard) at the address below or by the internet at:

<http://www.dod.mil/dfas/money/garnish/> - scroll down to the USFSPA section, and then click on Application for Former Spouse Payments from Retired Pay

(b) Obtain the documents required by the form, including a certified copy of the court order, certified no more than 90 days earlier. (Certification means only that the court has

authenticated the copy of the court order; it doesn't require you to actually go through another court hearing.)

(c) Send the paperwork by certified mail to:

DIRECTOR DFAS
CLEVELAND CENTER (CODE L)
PO BOX 998002
CLEVELAND OH 44199-8002

(Coast Guard: Commanding Officer (LGL, USCG, Pay and Personnel Center, 444 SE Quincy Street, Topeka KS 66683-3591).

c. Trade-offs:

You don't have to leave it up to the court to divide all your property, nor does all property need to be divided equally. You and your spouse can work out a trade-off that suits your needs; for example, the military member might agree to let the other spouse keep the home or send the kids to college in exchange for being allowed to keep all the retirement pay. The most important thing is to ensure everything's incorporated in writing as part of the divorce decree--or you risk the possibility of ending up back in court again sometime in the future.

7. SPOUSAL MAINTENANCE (Alimony):

A late 1995 legislative change in Texas law now allows for maintenance to be granted in limited cases. Maintenance can only be granted in the following situations: (1) A spouse was convicted of or has received deferred adjudication for family violence within the last two years, or (2) In a marriage of 10 years or more, where, after the property division, one spouse lacks sufficient property to provide for themselves, AND that spouse (a) cannot work because of an incapacitating physical or mental disability, OR (b) is the custodian of a child requiring substantial care because of a physical or mental disability, OR (c) lacks earning ability in the labor market. The court will consider a variety of factors in determining the amount of maintenance, but limits it to the lesser of \$2,500 per month or 20% of the average monthly gross income. The length of time a spouse can receive maintenance is also limited. In the absence of an incapacitating illness, payment of maintenance cannot exceed three years. It can terminate early upon the death of either spouse or remarriage or "conjugal" cohabitation by the receiving spouse. Additionally, maintenance provisions ordered through divorce decrees in other states are enforceable in Texas.

8. CHILD CUSTODY:

When awarding child custody, the court is required to make the best interest of the child the primary consideration in the decision. Consequently, the court can award custody to either parent, to both, or to neither. The parent with custody is called the "managing conservator", while the other parent (usually the parent who pays child support and has visitation rights) is called the "possessory conservator". Standard possession orders regarding visitation are contained in the Texas Family

Code Chapter 153, Subchapter F (located at <http://www.capitol.state.tx.us/statutes/fa.toc.htm>). These provisions apply when the parents cannot agree.

- a. Child's input: If the child is at least 12 years old, he or she may choose the managing conservator through a written request filed with the court and subject to the court's approval.
 - b. Other factors: The court is supposed to award custody based only on the parent's qualifications and without regard to the sex of the parent.
 - c. Agreements between the parents: The parents may, independent of the court, decide in writing who will be given custody. The agreement must, however, still be approved by the court.
 - d. Joint custody: It is a rebuttable presumption in Texas that the appointment of the parents of a child as joint managing conservators is in the best interest of the child. Joint managing conservatorship under Texas law means the sharing of the rights, privileges, duties, and powers of a parent. These rights, privileges, duties and powers will be expressly allocated by the custody agreement. Joint custody does **not** mean:
 - (1) Both parties equally share the power to make all decisions. The court or agreement may give one parent the exclusive right to make certain decisions.
 - (2) Both parties have equal or nearly equal periods of physical possession of and access to the child. Normally, the court will designate one primary physical residence for the child.
- Joint conservatorship agreements must also include provisions to minimize any disruption of the child's education, daily routine, and association with friends. The agreement may also contain an alternative dispute resolution procedure that the parties agree to use (except in an emergency) before going back to court to request enforcement or modification of the decree.
- e. Child's residence: Generally, the managing conservator has the power to determine where the child will live. In a joint conservatorship, the agreement will either:
 - (1) Establish the child's county of legal residence; or,
 - (2) Designate one parent as having the sole legal right to decide the child's residence.
 - f. Duty to provide information: Both parents have a duty to inform the other parent in a timely manner of significant information concerning the child. Further, each parent is required to give **60** days notice to the other parent (by registered or certified mail) of an intended change in their residence, mailing address, home phone number, name of employer, work address, and work phone number. If they don't know of the change that far in advance, they must notify the other parent within five days after they learn of the intended change (such as PCS orders), and in any case, provide the new information within 10 days after the change. However, the court can change this if providing the information exposes either parent or the

child to harassment, abuse, harm, or injury.

g. Moving: Generally, a managing conservator who moves from the original county of residence while the possessory conservator continues to live there will have to pick the child up at the possessory conservator's residence at the conclusion of the visitation. If a change of residence results in increased expenses for either party, the court may order a fair allocation of those expenses between the parties, however, the payment of the increased costs by the party who moved is presumed. Additionally, some divorce decrees may contain a provision that prohibits the parties from moving outside a certain geographical area. If this is the case, court approval will be necessary in order to move outside of the expressly stated area.

h. Grandparents' rights: In Texas, either parent, either set of grandparents, or both sets can request the court to permit the grandparents access to the child. Access means only the right to see and communicate with the child; it differs from visitation because it doesn't necessarily include the right to possession of the child, that is, the right to take the child out of the custodial parent's control or home.

i. Change in custody: Either parent may ask the court to modify a custody agreement, or the parents may agree in writing (subject to the court's approval) to modify the custody arrangements.

(1) *Waiting period*: There's a one-year waiting period before any change can be made in designation of a sole managing conservator unless:

(a) The child's physical health is endangered or his emotional development significantly threatened by remaining in his present environment; or,

(b) The current sole managing conservator is seeking or consents to the modification, and it's in the child's best interests; or

(c) The current sole managing conservator has voluntarily relinquished actual care, control, and possession of the child for at least six months, and modification is in the best interest of the child.

(2) *Other requirements*:

(a) The circumstances of the child, sole managing conservator, possessory conservator or other party affected by the decree have materially and substantially changed;

(b) Appointing a new conservator--either sole or joint--would be an improvement for the child.

As the above requirements suggest, modification is very difficult to get unless both sides agree. Therefore, it is important to put forth your best effort for custody at the time of the divorce and not assume that you can reopen the custody issue later (when you expect to have more money for attorney fees, for example).

However, a 1995 legislative change provides that a written election regarding custody by a child 12 years or older is a ground for modification if the court finds the change in the best interest of the child.

9. CHILD SUPPORT:

Parents have a legal duty to support their children, so the court can order either or both parents to pay child support.

a. Amount:

Texas has a statutory schedule for child support, based on the obligor's (the supporting parent) monthly net resources (usually, all income, including non-taxable income like BAQ and BAS, minus federal taxes based on standard deduction at single rate, state taxes, and a few other expenses) of less than \$6,000:

- (1) one child--20 percent of the net resources
- (2) two children--25 percent
- (3) three children--30 percent
- (4) four children--35 percent
- (5) five or more children--at least 35 percent

These guidelines are considered presumptively reasonable, which means that they're to be used unless there are good reasons not to do so. The court may determine that the statutory guidelines are inappropriate based on factors such as the child's needs, the parents' ability to contribute to the child's support, and the amount of possession of and access to the child.

Multiple family adjusted guidelines exist to calculate the amount of support when the person paying support has children in more than one household. (Texas Family Code §§154.128, 154.129).

In the absence of evidence of the wage and salary income of a party, the court will presume that the party has wages or salary equal to the federal minimum wage for a forty hour week.

b. Duration:

Child support must be paid until:

- (1) The child reaches age 18 or thereafter as long as he or she is enrolled in high school until graduation (but no later than age 21 in any event);
- (2) The child gets married, even if younger than 18;
- (3) Indefinitely if the child, due to a physical or mental disability, can't support himself and the court so orders, or until the disabilities are removed for general purposes;
- (4) The obligor dies.

A child support order for more than one child should provide that when support for one of the children ends (for one of the reasons above) the amount of support for the remaining children will be adjusted to be in accordance with the support guidelines. Beware of an agreement that sets a level of support that will not change until all the children are no longer eligible. Note, however, that the guidelines only reduce support by 5% for each child that becomes ineligible.

The parents can agree in the divorce settlement to change the above rules, for example,

agreeing that child support will continue until the child is 21, regardless. However, make such agreements very carefully. A common clause in divorce settlements reads:

This agreement shall endure to the benefit of and be binding upon the heirs, assigns, executors, administrators, and personal representatives of the parties.

This may seem like a fairly innocuous clause, but in reality it can be dangerous: A husband and wife are divorced after five years of marriage; the wife gets custody of the 3 year-old son, and the husband pays \$150 a month in child support. The husband remarries and has two daughters by that marriage before dying seven years after the divorce. Normally, the child support payments to the son would cease (although the boy would be entitled to Social Security and VA benefits). However, if the father had agreed to the above clause, his estate could be seized to ensure child support payments until his son reached the age stipulated in the divorce agreement. This could leave his new wife and children out in the cold.

A better alternative would have been for the father to carry a life insurance policy naming his son as the beneficiary.

NOTE: Child support obligations are not discharged by filing for bankruptcy.

c. Relation to visitation:

Support can't be contingent on visitation rights; if you're the obligor, you can't stop payment even though your former spouse wrongfully denies you visitation. Your remedy is to ask the court to force your former spouse to obey the visitation order.

Normally, you also must continue to pay child support even though the child may be visiting you, but you and your former spouse can agree otherwise. Thus, if your child will be staying with you during the summers, you may want the decree to relieve you of making child support payments during this time.

d. Changing the amount:

The managing conservator can petition the court to increase child support if the circumstances have “materially and substantially” changed. However, an increase in the needs, standard of living, or lifestyle of the managing conservator does not warrant an increase in child support. The obligor (person who owes support) has a right to request a modification to decrease payments under the same standard; for example, if his or her ability to pay decreases because of circumstances such as losing a job or health-related disabilities. The birth of a new child by the obligor is also a factor to be considered in determining ability to pay, but remarriage and the support of step-children cannot be considered either to increase or decrease support..

e. Method of payment and assignment of child support:

Unless you and your former spouse agree otherwise, Texas law requires the judge to order that child support payments be made through a local registry, and except for good reason, order that

support payments be withheld from the obligor's (paying parent's) earnings. For military members, the automatic withholding can be accomplished by using the same forms and sending them to the same address indicated above in the section regarding the direct payment of retirement benefits.

10. MILITARY IMPLICATIONS:

a. ID cards:

When the divorce is final, the military member must try to regain the former spouse's ID card. If the sponsor can't reclaim the card, he or she should notify the Military ID card section. Dependent children may need to get new cards, depending on their privileges as explained below.

b. Family housing:

Legal separation or divorce usually requires you to move from military family housing (MFH). Specific details like the time in which a person must move out vary from installation to installation and year to year, but generally, a military member who no longer lives with his or her dependents or has custody for six months or less, is not authorized military family housing. Former spouses or legally separated spouses are not authorized military family housing.

c. Commissary, medical and exchange privileges:

(1) *Children:*

(a) Medical care: Divorce doesn't change the children's entitlement to medical care, either in civilian or military facilities.

(b) Commissary privileges: If the children are living with a former spouse who isn't also authorized commissary privileges, the children aren't entitled to commissary access. This is true regardless of how much of the children's support the military parent is providing.

(c) Theater and exchange privileges: This is authorized if the children are dependent of a military sponsor for more than half of their support irrespective of where they live.

(2) *Former Spouses:* The USFSPA provides some benefits in these areas to former spouses who remain unmarried. Any medical benefits cease permanently upon remarriage of the former spouse (not the military member).

(a) 20/20/20: The former spouse was married to the military member for at least 20 years, the military member had at least 20 years of service, and there was at least a 20-year overlap of the marriage and the military service.

(i) Commissary, theater, and exchange: As long as the former spouse is unmarried, he or she is entitled to the same privileges as before the divorce. If the former spouse remarries, these benefits are suspended: They're lost during the remarriage but are reinstated if that later marriage also ends.

(ii) Medical: Permanent medical care at military facilities is available for former spouses not covered by an employer-sponsored health care plan. CHAMPUS benefits are available if they aren't entitled to Medicare Part A insurance.

(b) Other former spouses: No other former spouses are eligible for exchange, commissary and theater privileges. The Department of Defense has negotiated a civilian group health care insurance plan for these spouses. The DOD doesn't pay for or subsidize the premium for this insurance, but the plan guarantees insurance eligibility if the former spouse enrolls soon after losing the entitlement to military medical care. For more information about the Continued Health Care Benefit Program (CHCBP) coverage, write or call CHCBP ADMINISTRATOR, PO BOX 1608, ROCKVILLE MD 20849-1608; phone (800) 809-6119.

Additionally, Spouses who fall in the **20/20/15** category (the marriage and military service both lasted at least 20 years, with the overlap at least 15 years but less than 20) are entitled to transitional health care. This includes full military care for a year after the divorce and a second year for certain preexisting health problems. However, if you were divorced before 1 April 1985, you may be entitled to different benefits; see a legal assistance attorney for more information.

d. Survivor Benefit Plan (SBP): Generally, whether a former spouse is covered under the SBP depends on whether a written agreement or court order provides such coverage:

(1) *No agreement or court order*: In this case, if you, as the service member, are currently providing coverage for your spouse, you may choose to continue the coverage for your former spouse after the divorce. You must exercise this option within one year of the divorce. If you remarry and want to provide coverage for your new spouse and/or children, you can also choose to end the coverage for your former spouse. In fact, if you want to cover your new wife and children, you must terminate the coverage for your former spouse. This election must be made within one year of your remarriage.

(2) *Written agreement or court order*: If the court requires you or you agree in writing to provide coverage for your former spouse, you must do so within one year of your divorce. You can't change this coverage unless you obtain a later court order or written agreement authorizing the change.

For the coverage under the original agreement or order to be effective, the **former spouse must also request it within one year** of the divorce. A former spouse may also initiate SBP coverage on their own behalf if the service member fails or refuses to honor a court-ratified agreement to make the election.

Questions regarding SBP applications should be directed to:

DFAS - CLEVELAND CENTER
RETIRED PAY OFFICE
CODE ROA
PO BOX 99191
CLEVELAND OH 44199-1126

(3) *Eligibility*: To be eligible for former-spouse coverage, you must meet any one of the following requirements:

- (a) You were married to the service member when he or she became eligible for retired pay and were divorced after your spouse retired;
- (b) You divorced the service member before the member became eligible for retirement pay;
- (c) You married the service member after retirement and were married for at least a year; **OR**,
- (d) You married the service member after retirement and had children.

(4) *Suspension or termination of coverage*: If you're a former spouse covered under SBP, the coverage is suspended if you remarry before you turn 55. However, if the remarriage ends, your coverage is reinstated. Coverage also terminates upon your death. However, either your death or remarriage doesn't affect coverage for your children if they're also covered under the SBP.

11. ACTIONS AFTER DIVORCE

a. Name change: A divorce doesn't automatically restore the wife's previous name. The court can change your name--but only if you make a specific request . Changing your name does not release you from any liability you incurred under your former name (such as debts) or take away any rights you had under your married name.

However, if you had your name changed, make sure you notify your creditors, banks, and other similar institutions; send a certified copy of the court order to the IRS district office; and request a new Social Security card (not a number).

b. Remarriage: Texas law forbids you from marrying a third party for the 30 days immediately after the divorce decree is final, although this may be waived for good cause. However, you and your former spouse may remarry at any time.

c. Wills: Until your divorce is final, provisions regarding your spouse in your will are still effective (even if you're legally separated or have filed for divorce). A final divorce decree, however, nullifies any will provisions relating to your former spouse. Either way, it's a good idea to prepare a new will.

d. Insurance:

(1) *Life insurance*: If a decree of divorce is rendered after an insured has designated his spouse as a beneficiary of a life insurance policy the former spouse generally will not receive the proceeds unless the decree designates the former spouse as the beneficiary or the insured redesignates the former spouse as the beneficiary.

(2) *Automobile insurance*: Some policies issued in one spouse's name may not

cover the other spouse when they aren't living in the same household. This usually applies only when one spouse is driving a car not owned by the couple. Check with your insurance agent.

(3) *Homeowners' policies*: Most policies insure your personal belongings-- clothing, jewelry, household goods, etc.-- while they're in your home. However, if you and your spouse are living apart, your insurance may not apply to both households. Again, contact your agent.

12. TAX ASPECTS:

Remember that the tax laws change every year. Check with your attorney, tax preparer and the IRS for current tax guidelines.

a. Alimony: The IRS has specific requirements your lawyer needs to follow if drafting an alimony agreement.

(1) *Recipient*: You must pay tax on alimony as income.

(2) *Paying Spouse*: Alimony--if clearly labeled as such in the agreement--is deducted from your gross income.

b. Child support:

(1) *Custodial parent (managing conservator)*: You don't have to pay taxes on any child support you receive for your children. If you receive both alimony and child support, again, make sure that each is clearly labeled. If not clearly designated as child support, the IRS often assumes the money received from your former spouse is alimony.

(2) *Dependency exemption*: In the typical divorce, the parents provide all or most of the child's support and one or both of the parents have custody of the child all the time. In these cases, *IRS Publication 501* sets forth these guidelines:

(a) *Custodial parent (managing conservator)*: Generally, the parent who has custody the greater part of the year is considered to be the parent who provides more than half the child's support. It doesn't matter whether you actually provided more than half of the support. As sole managing conservator, you're entitled to the deduction. In the case of joint custody, or joint managing conservators, the parent who has custody for more than six months is entitled to the deduction. If custody is exactly equal, the divorce decree should resolve this by declaring who is entitled to the deduction.

(b) *Non-custodial parent (possessory conservator)*: To claim the deduction, your former spouse must have signed a written declaration releasing the exemption to you as the non-custodial parent. The declaration can release the exemption for one year, for a number of specified years (for example, for alternate years) or for all future years. The IRS has a specific form, *Release of Claim to Exemption for Child of Divorced or Separated Parents (IRS Form 8332)*, you can use. You must attach the original declaration to your tax return for a single-year exemption and

the original the first year, then copies each year, for releases of more than a year.

13. ENFORCING DIVORCE DECREES:

a. Property division: If your former spouse hasn't divided the property as ordered by the court, you have to right to seek legal enforcement--but you'll probably have to go back to court to do it. A motion to enforce the division of tangible personal property existing at the time of the decree must be filed within two years after the divorce becomes final. The court can't amend, modify, alter or change the original property division, but it can clarify or more precisely specify the manner of carrying out the property division

The court has several options for enforcing the property division:

- (1) Ordering your former spouse to deliver the property;
- (2) Awarding you a money judgment for damages caused by the failure to deliver the property; and/or
- (3) Citing your former spouse for contempt, which carries the possibility of jail time and monetary fines if *he* or she refuses to comply with the court-ordered property division.

b. Visitation or child custody: If you're the custodial parent and you refuse to allow your former spouse the visitation required by the divorce decree, you can be held in contempt and be punished by confinement in jail, a fine, or both.

If the non-custodial parent or grandparents who have been granted access refuse to return a child after visitation, you can petition the court for a *Writ of Habeas Corpus* to compel the return of the child. This can be used to enforce a valid court order granted by another jurisdiction as well as a Texas order. The only exception is if there's a serious immediate question concerning the child's welfare, in which case the court may issue a temporary order preventing return of the child.

In either case, after two or more violations of the court order, the party who's been refusing to comply can be forced to post a security bond that will be forfeited if another violation occurs.

Tort liability also can be imposed against a person who violates a court order regarding child custody or possession. In other words, if you violate the order, you can be sued for damages, including the costs and expenses of locating and recovering the child, court costs and attorney fees, and mental anguish and suffering. Additionally, if you acted with malice or the intent to harm your former spouse, you can be found liable for punitive or exemplary damages--which in the past have been awarded in amounts as high as \$53 million.

The point of all this is that violating a child custody order is not something you do to get back at or punish your former spouse. It doesn't just hurt the other parent, it harms the children--and it can hurt you as well. Visitation and child support are not reciprocal obligations. You cannot refuse to comply with your obligations because your former spouse is not complying with his or her obligations.

c. Child support: If your former spouse isn't paying child support, as mentioned earlier, refusing to permit him or her visitation isn't a solution. You have several avenues open to you in these cases:

(1) You can seek to have the obligor held in contempt.

(2) If the nonpaying spouse is out of state, you can seek a remedy under the *Uniform Interstate Family Support Act*. Unlike the old laws, this act allows private attorneys, not just the Attorney General's office to attempt to collect child support. It also provides for garnishment of wages. Many private firms now offer child support collection services in exchange for a percentage of the support collected.

(3) *Garnishment*: If the non-paying parent is employed in Texas or is active-duty or retired military, his or her pay can be garnished (involuntarily and automatically withheld) to pay back child support. This is in addition to the automatic withholding for current support obligations. The requirements are as follows:

- (a) The obligor must be at least two months behind in the payments.
- (b) The court must order the garnishment.
- (c) No more than half of the paying parent's pay can be withheld for both current and past-due child support.
- (d) The obligor can't be self-employed. (Self-employed parents may have to post a bond with the court instead.)

To garnish wages, you must delivery a certified copy of the court order to your former spouse's employer, either by certified mail or personal service. For retired or active-duty military members, use the same addresses as for the original child-support withholding orders. The employer must begin withholding no later than the first pay period occurring 14 days after receiving the order.

(4) *Criminal penalties*: A parent who is legally obligated to and financially capable of providing child support but who knowingly or intentionally fails to do so can be convicted of a state jail felony which is punishable by confinement, a fine, or both.

(5) *Other penalties*: A court (or the Attorney General's office) may issue an order suspending a license if a parent has at least a 90 day arrearage in support due under an order, and has been provided an opportunity to make agreed or court ordered repayments on that arrearage, and has failed to comply with the repayment schedule. Such licenses include professional, recreational, and driving licenses.

Summary/Disclaimer

The foregoing is only intended to be a brief summary of Texas divorce law. It is by no means a substitute for speaking with an attorney concerning your unique situation. If you have any questions concerning the material contained in this pamphlet, please come into the legal office during legal assistance hours.